

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ARMSTRONG, et al.,	:	07-CV-3561
	:	
Plaintiff,	:	
	:	
v.	:	May 14, 2008
	:	
METROPOLITAN TRANSPORTATION	:	500 Pearl Street
AUTHORITY, et al.,	:	New York, New York
	:	
Defendants.	:	

TRANSCRIPT OF CIVIL CAUSE FOR GENERAL
PRETRIAL SUPERVISION AND DISCOVERY DISPUTES
BEFORE THE HONORABLE HENRY B. PITMAN
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiffs: DEANNA WALDRON, ESQ.
RACHEL NICOTRA, ESO.

For the Defendant: CRAIG BENSON, ESQ.
STEPHEN FUCHS, ESO

Court Transcriber: SHARI RIEMER
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Saratoga Springs, New York 12866

1 THE CLERK: Armstrong v. MTA.

2 Counsel, please state your name for the record.

3 MS. WALDRON: Deanna Waldron of McLaughlin and Stern
4 for plaintiffs. I'm here with Rachel Nicotra and my co-counsel
5 Mr. l.

6 MR. SIEGEL: Norman l, 260 Madison Avenue.

7 MR. BENSON: My name is Craig Benson along with
8 Stephen Fuchs from the law firm of Littler Mendelson P.C.
9 Along with us is Rhonda Mull who is in-house counsel for the
10 MTA.

11 THE COURT: Good afternoon all. Judge Lynch has
12 referred the matter to me to resolve discovery disputes.
13 Actually for the purpose of general pretrial supervision,
14 excuse me, which includes resolving discovery disputes and
15 scheduling issues. He's also sent me the party's joint letter
16 of May 5, 2008 which is the -- which outlines the disputes that
17 brings us here.

18 With respect to the scheduling issue, I'm going to
19 grant -- both sides I take it want the additional ninety days.

20 MS. WALDRON: Yes, Your Honor.

21 THE COURT: The discovery is extended by ninety days.
22 You should contact Judge Lynch's staff about the June 13
23 conference to see what he wants to do with that. I can't
24 control Judge Lynch's calendar so you should contact his staff.

25 The next issue -- the substantive discovery issue,

1 the real discovery issues are the production of personnel files
2 and the extent to which they should be produced. They seem to
3 fall into two categories I think in terms of comparators and
4 non-comparators. Why don't we talk about -- one thing which
5 might be helpful to start and maybe we can get this from
6 counsel for defendant.

7 Can counsel for defendant tell me generally the
8 classes of information that are in personnel files for the MTA
9 police? Is there some kind of matrix of what goes into a
10 personnel file?

11 MR. BENSON: There's no matrix, Your Honor. There are
12 files that come from several different areas in the MTA that go
13 into a police officer's file. There's an Internal Affairs file
14 which would include the applicant investigation when the police
15 officer was first interviewed, the extensive background check
16 that goes in. There's disciplinary files. There could be a
17 file if the person was employed by the Long Island Railroad
18 prior to the MTA PD being created. There would be a file with
19 that or the Metro North Railroad. There would be a training
20 file. There could be a benefits file. There are several
21 different components that come from different areas of the MTA
22 structure, all of which are generated with response to the
23 documents that were responsive to the original discovery
24 request for a police officer. So there's a lot of different
25 pieces of file encompassing the discovery request could be

1 quite large depending on how long the police officer had been
2 employed or how extensive the background for that police
3 officer was.

4 THE COURT: Let me turn to the -- let's address the
5 comparators first because maybe that's the easier issue. With
6 respect to the comparators, maybe plaintiffs can start by
7 telling me exactly what do you want with respect to the
8 comparators and why. It seems to me the whole file might well
9 be overbroad but I'm happy to hear what you have to say.

10 MS. WALDRON: Well, Your Honor, we may be able to not
11 need the medical or benefits file portion of it but the
12 portions that we do are very interested in are the
13 disciplinary, the training files and any other -- we don't
14 really know exactly what's in the files either but any relevant
15 part of the file that shows commendations that they're awarded,
16 applications that they've gone for any positions because the
17 reason why that we need these files is because we claim that
18 these people are similarly situated to some of our claims. It's
19 not all ten but some who are applying for positions, promotions
20 to detective, for trainings, for positions in special units and
21 that these are some of the comparators. We've limited, Your
22 Honor, quite a lot to what we think that we -- there may be
23 additional comparators that we would like but we're limiting it
24 to these people who were promoted to detective in the past four
25 years and also persons who received transfer into one of the

1 special units called the Inter Counter Terrorism Task Force. I
2 hope I got that right. ICTF is what everyone calls it in our
3 case. So that's the why.

4 We have plaintiffs who applied for and were not
5 promoted to detective in that same time period and who also
6 applied --

7 THE COURT: I should have said this before. If you'd
8 like to remain seated if you're more comfortable. Whatever
9 your pleasure is. It goes for everybody. Go ahead. I'm sorry
10 for interrupting. Go ahead.

11 You were talking about the ICTF --

12 MS. WALDRON: Transfer -- we claim that these, the
13 people whose files, the comparators that we're looking for is
14 the files are people who were promoted to detective were
15 transferred into special units or received training within the
16 past few years that certain of our plaintiffs also were
17 claiming for. That's why we seek for these comparators.

18 Then in addition, comparators actually fall into two
19 different categories. Your Honor, the other category of
20 comparators are people who -- members of the police department
21 who were given or not given discipline based on incidents that
22 we believe were either more egregious than incidents that our
23 plaintiffs were subject to -- were disciplined for or -- yes,
24 that's about it.

25 THE COURT: Well, presumably if there was a charge

1 that would be in the disciplinary files whether or not it
2 resulted in sanctions.

3 MS. WALDRON: We don't know, Your Honor. We have only
4 seen our plaintiff's files. So we don't know what's in the
5 other files.

6 THE COURT: If someone did something inappropriate
7 that they were never written or possibly inappropriate that
8 they were never written up for, it would seem that there would
9 not be any paper record.

10 MS. WALDRON: Well, Your Honor, some of them
11 there's -- that's the other reason why we were asking for
12 particularly sometimes greater than just the disciplinary file
13 because sometimes they put things -- they're almost unofficial
14 memos about things that people have done but that they don't
15 rise to the level of a disciplinary charge and those are --
16 we've seen that happen in at least -- in some of own
17 plaintiff's case. The five disciplinary comparators that we're
18 seeking disciplinary files for though were -- there are charges
19 filed and if the question is that the way that that
20 disciplinary was handled and also the level of discipline that
21 was given for incidents that we believe are much more egregious
22 than things that our plaintiffs were involved in and some of
23 our plaintiffs have been subject to discipline that we think
24 was unwarranted. So there's definitely an issue in this case
25 about discipline and who gets it and how and what kind of

1 discipline.

2 THE COURT: So with respect to comparators what I
3 understand you'd be looking for are the disciplinary file or
4 other documents reflecting some type of misconduct. The
5 training file, I guess their initial application which would
6 have their credentials and the applications for promotion.

7 MS. WALDRON: And applications for transfers and
8 trainings. That would include supervisor recommendations.
9 Again, we don't know exactly what it looks like but that's what
10 we believe that it looks like.

11 THE COURT: All right. Who wants to address the issue
12 from defendant's side?

13 MR. BENSON: I will, Your Honor. From our standpoint
14 the whole case revolves around the concept of similarly
15 situated in comparators because I think we're all in agreement
16 that in order for us to have to produce these things they have
17 to be legitimate comparators.

18 THE COURT: The ultimate -- I read that in the letter
19 but the ultimate issue of whether someone is an appropriate
20 comparator or not is ordinarily a question of fact for the
21 jury. Look, I'm not trying to foreclose the issue but if you
22 want to resist discovery on the grounds that these individuals
23 are not appropriate comparators don't I need a factual
24 submission establishing that the punitive comparators are so
25 differently situated that no reasonable jury could find that

1 they're comparators.

2 MR. BENSON: I don't disagree with Your Honor's
3 assessment of that and we have never taken the position that
4 they're not entitled to legitimate evidence when it comes to
5 comparators, but what we're talking about here, for example,
6 is -- Ms. Waldron said that these are individuals who were
7 promoted to detective and some of the plaintiffs weren't.

8 Well, these individuals were promoted to detective at a time
9 when not a single one of the plaintiffs applied to be a
10 detective.

11 So, yes, if the plaintiffs had gone for a position
12 and these individuals had gone for the same position and were
13 appointed and the plaintiffs weren't, we have no problem giving
14 the applications over and they have a legitimate right to
15 compare them. But we're talking here about apples and oranges.
16 Simply because somebody at one point in time applied to be a
17 detective and was appointed a detective does not mean that that
18 opens up their personnel file for all kinds for anybody in the
19 future who might ultimately apply for detective down the road
20 and not get appointed. Different times, different decision
21 makers, different everything. I mean they are not even close
22 in terms of similarly situated from a comparison standpoint.

23 Again, in terms of training, anything. We've made it
24 clear to the plaintiffs that to the extent that they can
25 identify any single individual who was allegedly provided with

1 an opportunity that any one of the plaintiffs was denied, we
2 are more than willing to give them relevant documentation with
3 respect to that individual. They have failed to come forward
4 with any such contention.

5 THE COURT: Well, the law with respect to discovery
6 though is that the party resisting discovery ordinarily bears
7 the burden of establishing that the discovery sought is
8 inappropriate. Look, it's theoretically possible that the
9 individuals that the plaintiffs have designated as comparators
10 are so dissimilarly situated than plaintiffs are that perhaps
11 as a matter of law they could not be considered comparators.
12 That may well be the case but -- I don't know if it is or
13 isn't, but before I can reach that conclusion isn't it
14 incumbent upon the defendants as the party resisting discovery
15 to make a factual showing that the individuals who are
16 designated as comparators by plaintiffs are so differently
17 situated that they're not appropriate comparators as a matter
18 of law which doesn't -- and in turn doesn't that then require a
19 showing that comparator number one is different from plaintiff
20 1 through 10 because fill in the blank? Comparator 2 is
21 different from plaintiffs 1 through 10 because fill in the
22 blank.

23 MR. BENSON: Well, as I've stated, Your Honor, all --

24 THE COURT: Go ahead.

25 MR. BENSON: If I may. I don't mean to interrupt

1 you.

2 THE COURT: I'm sorry, go ahead.

3 MR. BENSON All comparators to the extent that these
4 were individuals who were "promoted to detective" were promoted
5 to detective at a time when not a single one of the plaintiffs
6 applied to be a detective and I would think that that would
7 satisfy exactly the standard that Your Honor just articulated.
8 I mean similarly situated does have meaning and it -- if
9 they're going to establish that they were discriminated against
10 they need to show that they were treated differently from
11 similarly situated individuals. Individuals who were promoted
12 several years before or at a time when none of them applied are
13 not similarly situated, and this brings me to the second point
14 which sort of is important for us to address as we look at this
15 entire dispute and that is that this is not a pattern and
16 practice case. It cannot be a pattern and practice case
17 because it is not a class action. It is essentially ten
18 separate individual disparate treatment lawsuits and in a
19 disparate treatment lawsuit the burden is on the plaintiff
20 ultimately to show that they were discriminated against vis-a-
21 vis similarly situated individuals.

22 So the fact that there may have been at another point
23 in time while one could potentially argue that --

24 THE COURT: Well, one of the ways you show intent
25 though or one of the ways you can show intent is through

1 similar act evidence. Morgan -- was it Morgan v. Amtrak
2 expressly notes that and 404 of the Federal Rules of Evidence -
3 - I don't know if it's 404 or 403 says that one of the ways you
4 can -- [inaudible] mimic is the way I learned it in law school,
5 motive, intent, absence of mistake, identity, common plan or
6 scheme where the issue -- the issues on which you can show --
7 are the issues on which you can show similar act evidence.

8 So intent is ordinarily something -- an issue on
9 which similar act evidence is admissible.

10 MR. BENSON: That may be true. However, when you're
11 talking about discrete acts. For example, when you're talking
12 about promotions, when you're talking about training, things
13 like that that happened in a discrete point in time the case
14 law is very clear that you cannot go back and pull in that sort
15 of general comparative evidence. The Supreme Court was very
16 clear on that.

17 THE COURT: No, the issue -- if X is the plaintiff or
18 the -- let's assume the plaintiff is an X and make X any
19 protective characteristic you want to be and if the plaintiff
20 is saying I was not promoted because I'm X and if you can show
21 that the decision maker at another point in time said we have
22 too many X's around the shop, we don't need any more of these
23 X's well, that would be admissible.

24 MR. BENSON: Depending on -- depending on temporal
25 proximities.

1 THE COURT: Exactly. If it's twenty years before the
2 decision maybe not but let's assume it's within two years of
3 the decision it would be admissible --

4 MR. BENSON: But that's a discrete smoking gun sort
5 of -- that goes into the whole stray remark different type of
6 evidentiary issue, but my point is simply that is that the case
7 law is clear that when you are dealing with discrete acts that
8 happened at a point in time that you can't go into that sort of
9 continuing violation type evidence that Your Honor is speaking
10 about and --

11 THE COURT: Well, but we may be getting off -- it's a
12 fascinating discussion but we may be getting a little far
13 afield of the comparator discovery issue.

14 MS. WALDRON: As far as I know factually, Your Honor,
15 we have allegations from our plaintiffs that they did apply at
16 the same time as some of these individuals and they also
17 applied in the year before and the year after and there's a
18 question of fact here about these abstracts or applications or
19 postings that they call it at the MTA, abstracts, call for
20 abstracts that we believe that it's not clear who applied when
21 so that we picked the people who were promoted in 2004 which is
22 not even calling into -- anything about the statute of
23 limitations issue that as we all say philosophically has raised
24 at this point, but these are people in the past -- statute of
25 limitations period and these are people -- plaintiffs --

1 factually we agree. There would have to be a hearing on
2 whether these people are similarly -- we believe they are
3 similarly situated because plaintiffs have applied within the
4 year -- that year and the year before and the year after for
5 the similar positions and it's not just having to do with,
6 again -- Your Honor is right. Having to do with the motive and
7 intent and all of that. Also, for discrimination claims we
8 believe it's completely relevant for --

9 THE COURT: It seems to me unless the defendant can
10 make a factual showing -- I'm happy to give the defendant the
11 opportunity, to chance to do that and I'll give plaintiff a
12 chance to respond but unless the defendant makes a factual
13 showing that the punitive comparators are so differently
14 situated that as a matter of law they could not reasonably be
15 held or could not reasonably be found to be comparators the
16 plaintiffs are entitled to discovery of the personnel files to
17 the extent of disciplinary files or documents reflecting the
18 charges of misconduct, training files, the initial application,
19 applications for promotion, applications for training.

20 If you want to make -- if you want to endeavor to
21 make a factual showing that these people are so different that
22 they couldn't be comparators as a matter of law I'm happy to
23 give you the chance to do that, Mr. Benson.

24 MR. BENSON: Yes.

25 THE COURT: If you want to do that we'll set a

1 schedule.

2 MR. BENSON: Why don't we set a schedule and we will
3 endeavor to resolve this separate and apart from that schedule
4 and hopefully not use it.

5 THE COURT: All right.

6 MR. BENSON: How's that?

7 THE COURT: All right. If you want to make the
8 factual showing can you -- what I'm thinking about is your
9 submission a week from today and plaintiff's submission the
10 29th, a week from tomorrow. I'm inclined to give them one more
11 day because of the Memorial Day weekend. Or do you want some
12 other schedule? What do you think?

13 MR. BENSON: Your Honor, if we could have a little
14 more time than one week.

15 THE COURT: How much time do you want?

16 MR. BENSON: The following Monday would be --

17 THE COURT: It would be the following Tuesday, the
18 27th.

19 MR. BENSON: The following Tuesday the 27th.

20 MS. WALDRON: Your Honor, we would request the same
21 amount of time.

22 THE COURT: All right. So that's going to be
23 plaintiff's submission on the 27th --

24 MS. WALDRON: Defendant's.

25 THE COURT: I'm sorry, defendant's submission. I'm

1 sorry. The 27th. So that's thirteen days from today. So
2 thirteen days from the 27th is going to be May -- June 9th I
3 guess.

4 MS. WALDRON: Your Honor, I'm sorry to ask again. Ms.
5 Nicotra and I both have -- we're actually going to be out of
6 the office the 4th, 5th and 6th. So if we could have just a
7 few more days. Just not on the 9th.

8 THE COURT: What do you want?

9 MS. WALDRON: The 11th.

10 THE COURT: Any objection to that?

11 MR. BENSON: No objection.

12 THE COURT: So the response on the 11th. If you can
13 work it out just all --

14 MR. BENSON: Just so I understand Your Honor that if
15 we were going to produce it would be limited to the discipline
16 file, it would be limited to the training file, it would be
17 limited to the application for detective, and I think you also
18 said the initial application and that's the part that's a
19 little troubling to me is the initial application to become a
20 PD.

21 THE COURT: I presume if somebody -- it's relevant I
22 suppose because if someone has a Ph.D. in criminology from
23 Harvard, if Harvard gives such degrees, and someone else has an
24 associate's degree from a lesser institution I presume that's
25 relevant to why one person got promoted and one person didn't.

1 That's why I thought the initial qualifications might be
2 relevant. If someone comes to the MTA police force having
3 spent ten years on the New York City police force and you've
4 got somebody else who comes to the MTA police force fresh out
5 of high school or fresh out of college I would think that would
6 be relevant.

7 MR. BENSON: That's a fair point. Again, just so we
8 don't split hairs here. We're talking about the application,
9 not like the Internal Affairs investigation that goes along
10 with it.

11 THE COURT: No, not the Internal Affairs.

12 MR. BENSON: The initial application.

13 THE COURT: The things that show their qualifications.

14 MR. BENSON: That's fine.

15 THE COURT: What you'd put on a resume or CV, that
16 type of information.

17 The other thing is one thing you didn't list, Mr.
18 Benson, which I had listed and this was in response to Ms.
19 Waldron's comments, if there are any other documents in the
20 file even if they're outside the disciplinary file that
21 reflects some kind of misconduct. She was concerned about
22 people who were -- may have engaged in misconduct and weren't
23 prosecuted for for want of a better word. So if there were
24 other documents in the file reflecting on the job misconduct
25 whether they're in the disciplinary file or not --

1 MR. BENSON: I would -- they would have to be but
2 I'll -- we'll endeavor to look if in fact they're not.

3 MS. WALDRON: The other thing, Your Honor, that wasn't
4 mentioned but I'm assuming it will be -- we may not have a
5 problem about this, but application for transfer to the special
6 units and also commendations because the commendations would
7 also be something that would go into whether someone is getting
8 a position or not.

9 MR. FUCHS: Just a point of clarification on the way
10 these documents work, Your Honor.

11 THE COURT: Hold on one second before you get to that
12 point of clarification.

13 Is there any objection to applications for transfer
14 and commendations?

15 MR. BENSON: Other than the big picture objection, no.

16 THE COURT: Mr. Fuchs, what did you want to say?

17 MR. FUCHS: As I was stating, one of the articles
18 that's at issue here is something called an abstract. That's
19 something that an officer submits in response to a notice that
20 there's an opportunity to apply for a certain unit or for
21 detective. Those documents may not necessarily be within the
22 personnel files that have been requested and have been produced
23 separately. So --

24 MR. BENSON: They've already been produced.

25 MR. FUCHS: They have already been produced.

1 MS. WALDRON: We have them already. We don't want
2 them again.

3 THE COURT: The next -- the other half of the issue
4 here -- I guess there's also a third piece with respect to the
5 rosters. The supervisors and decision makers. Let me hear
6 from plaintiff's side first on exactly what they're looking for
7 and why.

8 MS. WALDRON: Well, Your Honor, we believe that the
9 supervisors here -- it's a twofold argument. One, that they
10 have themselves are similarly situated to our plaintiffs in the
11 sense that they have committed their own serious infractions
12 that -- and other issues, disciplinary penalties that they have
13 had some incidents but that they haven't been disciplined as
14 harshly as our plaintiffs have been. So there's that.

15 Then these are also -- most of these individuals that
16 we requested or all of them are what we call the decision
17 makers in the case -- at least one or more of our plaintiff's
18 cases and that to show what's in their files is again relevant
19 to as Your Honor said before the intent in a discrimination
20 case. While they have -- the defendants have purported to give
21 over -- turn over to us things such as civilian complaints and
22 other complaints file with their internal OCR which is their
23 EEOC office. We know that -- it's come up in at least one of
24 our plaintiff's case where she claims that one of her
25 supervisors claims that she wrote her reports in ebonics which

1 she thinks is a racially discriminatory remark. She makes the
2 complaint about it but that did not show up in the production.
3 So that it's just an example, Your Honor, of how things that
4 they say -- without getting the full personnel file we don't
5 know how they're categorizing things. Just because they're not
6 putting it in the disciplinary file or they're not putting
7 it -- calling it something that's supposed to be regarding
8 discrimination that we didn't -- it wasn't produced to us.

9 So we believe that's why for the supervisors we
10 believe that this is -- there's other supervisors who have been
11 similarly --

12 THE COURT: If they're supervisors aren't they
13 dissimilarly situated by definition?

14 MS. WALDRON: No, Your Honor, because while they
15 were -- some of these events -- this is where again I guess
16 we're starting to come into -- this is a hostile work
17 environment continuing -- continued violation that's been going
18 on. Some of these supervisors have done things over the years
19 yet they're not disciplined in the same way. Under National
20 Railroad, as you had recognized, this would be background
21 evidence but it is potentially relevant to our case to show
22 that the supervisors are treated -- not just supervisors but
23 these specific --

24 THE COURT: Well, supervisors are always treated
25 differently. That's nothing new.

1 MS. WALDRON: Some of this happened while they weren't
2 supervisors is what we're trying to get at. So how they were
3 treated while they were could be relevant background evidence
4 and also the fact that these people did these things and yet
5 they still get promoted to supervisor while our plaintiffs were
6 having difficulty with this sort of -- and --

7 THE COURT: Then you're saying they're comparators.

8 MS. WALDRON: As I said, there's two -- some of these
9 supervisors we do admit they're similarly situated and just
10 with respect to the discipline. So with the disciplinary files
11 we need somewhere where we could actually accept --
12 disciplinary files or other documents that would reflect on
13 discipline whether it's not specifically in the disciplinary
14 file.

15 But, in addition, these supervisors, as I said,
16 they're promoted despite having had allegations of
17 discrimination against them and also, like I said, Your Honor,
18 there's at least -- we have one incident, at least one that we
19 can document where there is not any record that's been
20 produced. It's regarding Sergeant Kim Riley who made -- who
21 our plaintiff, named plaintiff or first plaintiff Marilyn
22 Armstrong has complained that she made a remark about ebonics
23 to her and that -- we received no discovery on that.

24 THE COURT: Do the supervisors for whom you're seeking
25 files, did they all have seniority to the plaintiffs?

1 MS. WALDRON: At this point they do.

2 THE COURT: If you're not claiming that they're
3 comparators I'm not sure that -- it seems to me that the
4 request for all disciplinary charges is more of a stretch.

5 MS. WALDRON: Your Honor, I was saying that there's
6 really a two pronged argument. They are similarly situated
7 when it comes to discipline and --

8 THE COURT: Well, not when they're supervisors and the
9 plaintiffs are not supervisors.

10 MS. WALDRON: But -- some of the incidents that we're
11 claiming the discovery regarding -- occurred before they were
12 supervisors.

13 THE COURT: Right. If that's a different point in
14 time then the point in time at which the plaintiffs were
15 disciplined for similar conduct the relevance becomes extremely
16 attenuated. If you have, for example -- if you have someone
17 who is a supervisor in 2005 who's disciplined in 1990 for
18 having a sloppy uniform --

19 MS. WALDRON: They're a little more egregious than
20 sloppy uniforms, Your Honor. It's like drunk driving and
21 things of this sort and things that our plaintiffs did which
22 were not.

23 Your Honor, I forgot. There was one other point
24 here. There is a hostile work environment claim here that
25 we -- our plaintiffs began working at the MTA back in the '80s.

1 THE COURT: But disparate discipline doesn't bear on
2 hostile work environment.

3 MS. WALDRON: I believe it can, Your Honor, if it's of
4 such a nature of that it's showing intimidation, insult,
5 ridicule, that you're being brought up on charges that for our
6 plaintiffs are quite minor or being written up for these memos
7 that I was talking about before where they're not actually then
8 later brought up on the charges but they're just intimidated by
9 this. Yet there's people who then later have become
10 supervisors have things like drunk driving or assault or
11 improper arrests and they're then still promoted to supervisor
12 we think it is relevant because we believe it's still
13 continuing on into today.

14 THE COURT: So for the supervisors and the decision
15 makers you're looking for documents reflecting charges of
16 misconduct?

17 MS. WALDRON: Again, not just -- the disciplinary file
18 but then also, Your Honor --

19 THE COURT: I'm using that language to get outside the
20 disciplinary file.

21 MS. WALDRON: Yes. Right, yes. Memos, we would say
22 any memos with regard to misconduct.

23 THE COURT: Yes. Documents reflecting charges of
24 misconduct.

25 MR. BENSON: May I be heard, Your Honor?

1 THE COURT: Yes, please.

2 MR. BENSON: It's important for you to understand that
3 when we're dealing with the term supervisor now that
4 anything -- and that would include anybody from sergeant,
5 lieutenant, captain, chief, these are --

6 THE COURT: I'm sorry to interrupt you. Maybe I'm
7 misunderstanding. I thought there were specific individuals
8 that they've named.

9 MR. BENSON: They have. But I just want you to
10 understand these individuals that they've named hold these
11 ranks.

12 THE COURT: Go ahead. I'm sorry.

13 MR. BENSON: The only way that one gets promoted to
14 those ranks is by passing a civil service test and promotion is
15 then based on one's rank on a civil service test. It does not
16 involve subjective assessments on the part of individuals in
17 the MTA. There's no allegation in this case that any of the
18 plaintiffs have applied for and didn't become sergeants or
19 lieutenants or anything of that nature. In other words, nobody
20 is claiming that they took and passed a test and were somehow
21 then discriminated against. So that's -- I give that as
22 backdrop for you to understand how different these individuals
23 are.

24 MS. WALDRON: Your Honor, I'm sorry to interrupt but
25 there are at least two plaintiffs who make those allegations.

1 MR. BENSON: What allegations?

2 THE COURT: Let Mr. Benson finish. I'll give you a
3 chance to respond.

4 MS. WALDRON: Sorry.

5 THE COURT: Go ahead.

6 MR. BENSON: So you are dealing with individuals who
7 are truly in a dissimilar position than any of the plaintiffs.
8 Judge Lynch directly addressed this issue in a conference
9 before him because it was these individuals' personnel files
10 where this subject was originally brought up and he held that
11 any instances of -- any allegations of discrimination against
12 these individuals is relevant and he went so far as to say any
13 allegations of improper force because of the connection between
14 improper force and race that might be relevant. So we produced
15 those things as well. His ruling was very limited in that
16 respect and in essentially holding and rightfully so that any
17 other aspects of their files as it pertains to their role in
18 this case as alleged discriminators was not relevant.

19 To claim now, to try to go around that ruling and get
20 at this information by alternatively arguing that these
21 individuals are comparators because, again, in terms of
22 discriminators Judge Lynch has ruled is disingenuous and is not
23 called for by any rule of evidence or anything else. I mean
24 these individuals are not remotely similarly situated with the
25 plaintiffs. Their promotion to sergeant or lieutenant or

1 whatever was again based on their passing a test that had
2 nothing to do with someone's subjective assessment of whether
3 they had engaged in discipline or not and I think does not
4 justify us providing their statutorily protected personnel
5 files.

6 THE COURT: Ms. Waldron.

7 MS. WALDRON: Well, first of all, I take issue with
8 Mr. Benson's characteristic if I can put it that way of Judge
9 Lynch's decision. We take the opposite view that Judge Lynch
10 was merely saying that these were -- I think we've quoted his
11 text. He said these were the personnel files of the bread and
12 butter. I don't think there's a transcript from that. I wish
13 there was, bread and butter of discrimination cases and that
14 the contents were relevant and then he just simply had gone on
15 to list which parts of that file he felt were particularly
16 relevant. I didn't in any sense get the sense and neither does
17 my co-counsel that the judge was limiting us to those.
18 Otherwise we would not have been continuing to seek this, these
19 kinds of files. That's my first point.

20 The second point is that there are allegations in
21 this case. There's one of our plaintiffs who was a -- had
22 achieved a level of captain and then was -- there's an issue
23 about why he is not a captain any more and that he was --

24 THE COURT: He was demote -- one of the plaintiffs was
25 demoted?

1 MS. WALDRON: They voluntarily -- this captain along
2 with three other white captains voluntarily took a demotion
3 because for collective bargaining reasons. While the others
4 then were re-promoted he was not. So there's an issue in the
5 case about that that is very relevant and impacts upon at least
6 -- it's Inspector Terrett and Inspector Dunn where that is
7 directly relevant because those are the two who were captains
8 with Mr. -- Bryan Henry and now took the demotion and then got
9 re-promoted whereas Henry did not.

10 Your Honor, this is a very complicated case in that
11 there's ten plaintiffs. They're at various different points in
12 their careers but everything we've asked for there's a reason.
13 We're not just -- we're not on a fishing expedition. We have
14 specific reasons for each one that if we parse through each one
15 we will go through but we were attempting to --

16 THE COURT: The notion that they're comparators --
17 unless one of the supervisors engaged in similar misconduct in
18 connection -- in misconduct that was similar to the misconduct
19 that one of the plaintiffs engaged in at or about the same time
20 as the plaintiff and while the supervisor held the same rank as
21 one of the plaintiffs --

22 MS. WALDRON: That would be Inspectors --

23 THE COURT: -- it seems to me that it's almost --
24 it's awfully close, maybe it's there, they're not similarly
25 situated as a matter of law.

1 MS. WALDRON: Well, Inspectors Dunn and Terrett are
2 perfect examples how they were similar situated to Captain
3 Henry -- to Lieutenant Henry when he was a captain and so that
4 at the time we should be entitled to have those files of when
5 he was -- they were -- at the same rank and there are issues
6 about that. That's why I say, Your Honor, that if we have to
7 take each one on a -- each individual on a point by point. As
8 I said before, we're willing to accept less for the supervisors
9 with regard to disciplinary and the other parts of that that --
10 the discipline that's not specifically in the disciplinary file
11 but that may impact upon it like misconduct.

12 Your Honor, we honestly -- we asked for these because
13 we've been told this but we can't -- without the files we don't
14 know what's in -- we don't know specifically. There's
15 allegations of this and they're in our complaint but we don't
16 know the specifics of it because we don't have the files.

17 THE COURT: Let me ask Mr. Benson. Mr. Benson, have
18 you seen -- just answer this question yes or no. Have you seen
19 the files of the individuals who are identified as supervisors
20 or decision makers or has someone on defendant's side seen
21 them?

22 MR. BENSON: I have, Your Honor.

23 THE COURT: Is the fight about real issues or is it a
24 theoretical fight? Just yes or no. Unfortunately I had this
25 come up with the NYPD with requests for disciplinary files and

1 often times -- I shouldn't say often times but sometimes what
2 happens is I order that the file be produced and there's
3 nothing in there anyway.

4 MR. BENSON: It's a real issue in the sense that if
5 you order the production of a disciplinary file for someone in
6 a supervisory position which going back to the commencement of
7 their employment there could be things -- Ms. Waldron mentioned
8 drunken driving. I don't know that any of the plaintiffs are
9 complaining about how they were disciplined for drunken
10 driving. We're talking about very different kinds of
11 discipline and with all of the individuals that they've asked
12 for if you go back to the commencement of their employment a
13 review of anything that they were disciplined for is just not
14 going to be comparable to what the plaintiffs are complaining
15 about. If the plaintiffs were complaining that -- make a
16 showing I was disciplined for X and we don't believe so and so
17 was disciplined in the same way in a relevant time period but
18 that's not what's happening here. They want to say that so and
19 so, Inspector So and So was not disciplined for drunken driving
20 and I got written up for talking back to someone or I got
21 written up for an incomplete memo book entry and seeking to
22 discover the entire disciplinary history is a way of showing
23 this general pattern and practice of allegedly blacks and
24 Hispanics receiving harsher discipline.

25 We think they need to make a showing. If it had been

1 articulated that Inspector Terrett and Inspector Dunne were re-
2 promoted to captain and Inspector Henry was not, we're willing
3 to piece that out and produce portions of files that relate to
4 that. That makes them in our view -- that's a valid comparison
5 but the issue is wholesale disclosure of all of these
6 supervisor's entire disciplinary histories is an intrusion and
7 we think we're duty bound to push back on this under the
8 statutory protection.

9 THE COURT: There are things there -- there really is
10 something there to fight over.

11 MR. BENSON: I would say it's a fair statement there's
12 something to fight over in all of these files.

13 THE COURT: You've looked at the files?

14 MR. BENSON: Yes, Your Honor.

15 THE COURT: What offenses are the plaintiffs claiming
16 they were unfairly disciplined for?

17 MS. WALDRON: Well, they're not as egregious as drunk
18 driving.

19 THE COURT: Do we have a list of what the plaintiffs
20 claim they were unfairly disciplined for?

21 MS. WALDRON: Well, it's a -- it spans a large -- from
22 things like being late and not reporting -- not writing the
23 reports to I think one of our -- assault.

24 [Pause in proceedings.]

25 MS. WALDRON: I think that's the range, Your Honor, of

1 where it goes from. So very, very minor to more significant.
2 I don't have an exact list right in front of me given that
3 there's ten people but I know it spans a wide array.

4 Then, Your Honor --

5 THE COURT: The problem that I'm having though is that
6 it sounds like you've got different times, the decision about
7 discipline is being made by different individuals. We don't
8 know if the supervisors had the same rank as the plaintiffs at
9 the time of the alleged misconduct. It seems like there are a
10 lot of differences which attenuate the relevance of what you're
11 seeking here.

12 MS. WALDRON: But the part that's all the same is that
13 this is -- there does seem, even though we are all arguing over
14 the use of this word pattern, there does seem to be some sort
15 of a practice that goes on there where people who then like
16 members have had things happen and that yet --

17 THE COURT: The fact that individuals who are of
18 higher rank are treated differently than people of a lower rank
19 though doesn't evidence anything.

20 MS. WALDRON: But they may not have been of a higher
21 rank, Your Honor, at the time which is the allegations that
22 are -- this is -- some of the allegations as I said -- Captain
23 Henry is a perfect example. Captain Henry and Dunne and
24 Terrett were all captains at the same time.

25 THE COURT: But then the problem is if the person

1 who's the supervisor today got a slap on the wrist for being
2 five minutes late ten years ago and one of the plaintiffs is
3 more seriously disciplined today for being late by a different
4 decision maker --

5 MS. WALDRON: I don't --

6 THE COURT: The relevance is attenuated.

7 MS. WALDRON: Well, we don't believe that that's
8 what -- we believe that there is more similarities to some of
9 these supervisors to the plaintiffs at the time than -- then as
10 I'm saying, these are what we are being told by our plaintiffs
11 and we need records. We can't disprove it or prove it unless
12 we have records to show that. We have some allegations. We
13 have some examples but we're going based on what the plaintiffs
14 who were there at the time are telling us. That's all we can
15 go on. We know -- at least Henry was of the same rank as two
16 of the people that we're looking for their files for, at least
17 during a portion of the -- we're looking for here.

18 I believe that that aids the case with other of the
19 supervisors on the list, that these supervisors weren't always
20 supervisors for twenty years while our plaintiffs were under
21 them. I think Sergeant Taylor was also just most recently
22 promoted.

23 MR. BENSON: If I may be heard, Your Honor.

24 THE COURT: Yes.

25 MR. BENSON: Under that logic every single personnel

1 record of every single member of the department would be
2 relevant and we would have an obligation to turn them over
3 because that's how removed this is. It is a fishing expedition
4 because they don't know, they don't have any idea of whether
5 these people are similar or not. As you said they were many,
6 many years removed with different people and different decision
7 makers involved. Even if something existed there's no way that
8 it could be relevant from -- or admissible from an evidentiary
9 perspective. These -- every situation is different and some
10 are closer than others but these are way out of bounds.

11 MS. WALDRON: The other -- Your Honor, I'll just go
12 back to again what I was saying earlier is that we -- in a
13 hostile work environment claim how you're treated if you're
14 treated to intimidation by being written up for minor
15 infractions while you know that other people in the department
16 have not been written up for things that are more serious I
17 believe that goes to a hostile work environment. If it's based
18 on -- if we can then show that those things were done because
19 of race.

20 THE COURT: Well, it would seem to me though that if
21 there's a disproportionate penalty assessed for a minor
22 infraction it has -- whatever relevance it may have to a
23 hostile work environment is going to exist whether there's a
24 comparator or not.

25 MS. WALDRON: But it would also -- Your Honor, it

1 would show that if you're the -- some of our plaintiffs know
2 that if one of the sergeants or lieutenants or inspectors have
3 been -- or lieutenants have had some more serious things happen
4 and they're subject to -- that could show evidence of the MTA's
5 intent and motive here that if white officers are white -- are
6 not then how would that make that -- that would go to show the
7 hostile work environment because they're like well, white
8 officers can get away with a lot more than African-American and
9 Hispanic officers. That would show a hostile work environment.

10 THE COURT: I'm not sure that is necessarily the case
11 but that's not something I have to decide.

12 [Pause in proceedings.]

13 THE COURT: What about the fact that in all
14 probability the decision makers for the supervisors are going
15 to be different individuals than the decision makers who are --
16 the decision makers with respect to the plaintiff's
17 infractions?

18 MS. WALDRON: Your Honor, without seeing the records I
19 can't tell you if that was true or not. If I don't know the
20 decision makers I can't tell you that they definitely were not
21 the same decision makers. The department does not have that
22 high of a turnover. It's very likely that they could have
23 possibly been. When I've been sitting in depositions I keep
24 hearing some of the same names come up over and over again. So
25 I'm not being speculating but I think that there is -- from

1 what we've seen there is a lot of the same decision makers in
2 this case. I think that that's -- then rises to a level of
3 like the Culhane and the McConville. I think that these --
4 they were involved in some of this.

5 The only other thing that Your Honor -- that I can
6 see is that if -- somehow for either Your Honor to do an in
7 camera inspection review first and then for us to be able to
8 tell -- without -- we only have the plaintiff's allegations.

9 THE COURT: An in camera review for what?

10 MS. WALDRON: To see if what these supervisor -- if
11 you're concerned that they don't -- that there's nothing there
12 or that there's no relevance then look at them. We believe
13 that they are relevant. We believe that some of the decision
14 makers are going to be the same decision makers that were
15 involved in our plaintiff's case and that I believe if that was
16 the case if a plaintiff sees a decision maker when -- make one
17 sort of a decision for a white member of the unit or the
18 department and makes a different decision based on -- for him
19 who's -- he's African-American or Hispanic then how is that --
20 I believe that goes directly to a hostile work environment. If
21 you feel like you're being treated differently for minor
22 infractions when -- and in addition to all the other comments
23 that we say that have been made over the years.

24 THE COURT: Well, the difference in treatment is not
25 enough unless the parties -- unless the comparator is similarly

1 situated the difference in treatment doesn't make a difference.
2 Court of Appeals judges have more floor space than magistrate
3 judges but that doesn't mean magistrate judges are the victims
4 of discrimination.

5 MS. WALDRON: What happens if all happened -- what if
6 they were promoted at the same time you were magistrate judge
7 with them and that's where we're getting at, Your Honor,
8 because some of these people were at the same level at the same
9 time as some of our plaintiffs. Again, if a hostile work
10 environment does not have a statute of limitations on it it can
11 go past the three or four years that we're working with in this
12 case and that's clear under National Railroad Morgan that that
13 is the case. If it's not it can go to background evidence. It
14 could go to motive. It could go to intent. Lots of different
15 things. We're talking about discovery here.

16 THE COURT: As you're getting temporally remote and
17 you have different decision makers involved the relevance
18 diminishes.

19 Let me just ask this question of Mr. Benson.

20 MS. WALDRON: Right.

21 THE COURT: What I'm thinking as a starting point
22 here -- let me just get your thoughts on it -- is limit -- with
23 respect to supervisors and decision makers limit the production
24 of the personnel file to those -- to any documents that reflect
25 allegations of discrimination, allegations of excessive force,

1 the two things that you say Judge Lynch already covered and
2 then have plaintiff prepare a list of the infractions for which
3 they've been disciplined and that they believe they've been
4 disciplined disproportionately and any similar charges of
5 misconduct against the supervisors. What are your thoughts on
6 that proposal?

7 MR. BENSON: Well, again, we've already produced the
8 discrimination and excessive force documents. With respect to
9 the other aspect of it, it would depend on the time period and
10 whether or not the same decision maker was involved. To the
11 extent that they can identify any alleged disparate discipline
12 that took place between one of these individuals and one of the
13 plaintiffs for the same --

14 THE COURT: They're not going to know what the
15 supervisor/decision maker's disciplinary record is. So asking
16 them to identify it creates an impossible task I think.

17 MR. BENSON: No. I mean they're going to identify the
18 discipline that the plaintiffs allegedly -- that they claim was
19 somehow untoward and then we're going to look at the files and
20 then we're going to see whether there was something that was
21 similar within a reasonable time period and involving a same
22 decision maker. If somebody falls into that category which is
23 a legitimate comparator then that documentation would be
24 provided. If it falls outside of that then it should not
25 rightfully be provided because for all the reasons that we've

1 indicated.

2 So our position from the beginning has always been we
3 will produce reasonable comparative evidence and that falls
4 into that.

5 MS. WALDRON: Your Honor, I think for the excessive
6 force was not necessarily when Judge Lynch made his ruling was
7 not limited to race, excessive force. If that's all that we
8 have --

9 THE COURT: If I understood Mr. Benson correctly I
10 don't think -- it's not my understanding that the defendant's
11 production of excessive force is limited to racially --

12 MR. BENSON: It was not, Your Honor.

13 MS. WALDRON: I'm sorry. We only received the ones
14 that had to do with race.

15 THE COURT: With respect to the disciplinary files of
16 the supervisors and decision makers this is what I'm going to
17 do is to direct the plaintiffs to provide a list of the
18 infractions that plaintiffs believe they were
19 disproportionately disciplined for and the date of the
20 infraction.

21 With respect to the supervisors or decision makers,
22 the defendants are either to produce documents reflecting
23 charges of misconduct to the same infractions --

24 MS. WALDRON: Your Honor -- I'm sorry.

25 THE COURT: One second.

1 Or explain why the charge with respect to the
2 supervisor decision maker is so remote either temporally or for
3 other reasons that discovery should not be made. If you choose
4 the latter course you can do it in a way that doesn't disclose
5 to whom the infraction relates. You can use a pseudonym or
6 just one of the -- you don't have to identify the supervisor or
7 decision maker by name.

8 What did you want to say, Ms. Waldron?

9 MS. WALDRON: The --

10 THE COURT: This doesn't capture more serious
11 infractions --

12 MS. WALDRON: That's what I was just -- more serious
13 infractions.

14 THE COURT: -- for which they got a slap on the wrist
15 but if the plaintiff doesn't know about the more serious -- if
16 the plaintiffs don't know about the more serious infractions
17 for which they got a slap on the wrist even under your theory
18 it couldn't contribute to a hostile environment.

19 MS. WALDRON: But no. That's what I was going to say.
20 Your Honor, we also would like to submit what the -- I will
21 gather from my plaintiffs the allegations of the more serious
22 infractions where they believe there was a slap on the wrist
23 and we will include that in our submission then.

24 THE COURT: Well --

25 MS. WALDRON: Because then Your Honor could see what

1 we have.

2 THE COURT: If there's specifics --

3 MS. WALDRON: I will. I don't have them now.

4 THE COURT: Why don't you raise those with Mr. Benson
5 in the first issue -- in the first instance but if there's
6 specifics maybe yes, maybe no, but at this point I'm not --
7 because we don't have specifics I'm not addressing that.

8 MS. WALDRON: If Your Honor -- after we raise it with
9 Mr. Benson the first instance which I anticipate they'll say
10 they know can I then submit it to Your Honor?

11 THE COURT: Yes, sure.

12 MS. WALDRON: Thank you.

13 THE COURT: I think that resolves the issues with
14 respect to the personnel files but let me ask counsel. Have I
15 overlooked anything with respect to the personnel files?

16 MS. WALDRON: Well, Your Honor, the only other thing
17 is the -- for the two named plaintiffs we don't have -- we
18 weren't even given anything at all. We believe that these were
19 decision makers for --

20 THE COURT: I'm sorry. I think you misspoke. You
21 said the two named plaintiffs?

22 MS. WALDRON: Defendants, defendants. I'm sorry if I
23 misspoke, Your Honor. Named defendants, Culhane and McConville
24 that we believe that we're entitled to some evidence about
25 their -- they're defendants. We believe that they -- any

1 documents regarding what their career records are, their
2 resumes, something of that sort just because we believe that
3 they were decision makers through most of what's happened in
4 this case and so that that kind of evidence -- that would be
5 relevant for us.

6 THE COURT: How does that bear on whether or not there
7 was discrimination? What if somebody went to college A or
8 college B or --

9 MS. WALDRON: Not just college. It's what their
10 career track is, what their -- basically their positions that
11 they held, what their -- it's really more for background
12 evidence. I can't believe that we don't have that. In every
13 other case that I have a defendant I get this kind of evidence
14 for defendants. That's why I'm a little surprised but they're
15 objecting to every piece of it. So we have to --

16 THE COURT: You want what positions they've held
17 within the MTA?

18 MS. WALDRON: Yes, career records, resumes. Then
19 we'll get to -- we believe some of these, I think those two
20 individuals also would fall into the other category of what
21 this infractions but --

22 THE COURT: People often ask about this kind of
23 information at depositions. I've never seen it used at a
24 trial.

25 Let me see what Mr. Benson's thoughts are first.

1 MR. BENSON: Well, again, we're talking about the
2 sanctity of the personnel files and presumably they're going to
3 depose these individuals and to the extent that they want to
4 find out the credentials of the individuals they can ask them
5 and we don't have to impact their personnel files.

6 THE COURT: I'm not sure there's sanctity attached to
7 personnel files.

8 MR. BENSON: No, there is sanctity attached to
9 personnel files.

10 THE COURT: Even in today's world I wouldn't go quite
11 that far.

12 MR. BENSON: Pursuant to Rule 50(a) of the New York
13 Civil Service --

14 THE COURT: That's not what sanctity means. That's a
15 statutory protection. That's not sanctity.

16 MR. BENSON: I misspoke, Your Honor. But my point is
17 that again we're going through the same thing that we went
18 through with Judge Lynch and he identified the portions of
19 their files that he believed were relevant with respect to the
20 claims at issue in this case and we have provided those to the
21 plaintiffs. Anything outside of that is really not relevant to
22 the allegations that are at issue here.

23 Again, to the extent that they will have the
24 opportunity to depose these people and presumably find out
25 certain information that will fill in the blank so to speak,

1 but it's really not a personnel file issue.

2 THE COURT: I'm not sure how someone's career track
3 within the MTA makes it more likely or less likely that he or
4 she will engage in discriminatory conduct. I'm not sure how
5 one establishes -- how one is relevant to the issue in the
6 case.

7 MS. WALDRON: Well, Your Honor, again we've made an
8 allegation that despite people knowing about discrimination,
9 despite people having been discriminators they're still seem to
10 manage to become supervisors or higher levels within the MTA.
11 So that would be -- this is really back --

12 THE COURT: Someone's career track, I don't see how --
13 we're talking about the two named defendants here and I don't
14 see how their career track makes it more likely or less likely
15 that they discriminated against the plaintiffs.

16 MS. WALDRON: Well, Your Honor, it's really having to
17 do with also -- it's starting to get into the next argument --
18 the next segment of documents, the command rosters. It's
19 really to state who was in what position -- what position were
20 they in at the time when some of the discrimination was
21 happening and if we can get it from the command rosters that
22 may also be -- we're trying a lot of different avenues here,
23 Your Honor, in that we're in the discovery phase and we're
24 trying -- we're not doing fishing but we believe that these
25 were things that will help the case, that there's evidence that

1 it's relevant to how the MTA is being run, where --

2 THE COURT: You're going to depose the individual
3 defendants?

4 MS. WALDRON: I guess we're going to have to.

5 THE COURT: I presume you're going to want to do that
6 in any event.

7 MS. WALDRON: Right. But without these records though
8 we're going to have to.

9 THE COURT: If all you're looking for is track your
10 career with the MTA --

11 THE COURT: In addition. In addition to the other
12 things we've already discussed, Your Honor.

13 THE COURT: I understand that's on par of what you're
14 looking for but isn't it -- is there any objection to that
15 question being asked at the deposition?

16 MR. BENSON: None, Your Honor.

17 THE COURT: You just do it at a deposition.

18 MS. WALDRON: Again, Your Honor, your ruling is your
19 ruling. I have received that in other cases but -- the command
20 rosters are of the same --

21 THE COURT: Let's talk about the command rosters.

22 Maybe the defendant can do this in the first instance. Can you
23 tell me exactly what the command roster is?

24 MR. BENSON: The documents we're referring to for the
25 time period we produced from 2003 to 2007 are a series of

1 charts which have boxes and lines and show the hierarchy in
2 department by department within the MTA PD and we produced
3 those four years back from the time of the complaint. And a
4 little box with this deputy chief and who's underneath that
5 person and so on.

6 THE COURT: It's only supervisors I take it.

7 MR. BENSON: Some of them are more complete year by
8 year than others. So they might not necessarily be a
9 supervisor but it doesn't go down to rank and file, uniform
10 police officers. It can go down to the lowest person that has
11 a certain function.

12 THE COURT: I see.

13 MR. BENSON: As I said, it's not consistent. What
14 they've asked for now goes back to the inception of the MTA PD
15 in 1998 to show the same kind of materials and the MTA's
16 position is this is not going to be background information for
17 a sexual harassment claim. It is reaching way back beyond the
18 limitations period and --

19 THE COURT: And you produced it for what period of
20 time?

21 MR. BENSON: We produced it for a four-year period
22 going back from the date of the complaint which would be the
23 limitations period under 42 U.S.C. 1981 which is the longest
24 limitations period.

25 THE COURT: So what is that, '03 to '07?

1 MR. BENSON: Correct.

2 MS. WALDRON: Yes, Your Honor, but we -- as I've
3 stated numerous times today, we have a hostile work environment
4 claim which does not limit by that statute of limitations
5 and --

6 THE COURT: Who was in what particular box? How did
7 that bear on hostile work environment?

8 MS. WALDRON: Because, Your Honor, while we were going
9 through -- we're asking for this evidence because we believe
10 it's actually going to be help for time saving and efficiency
11 purposes that when we're looking through who were the
12 supervisors at the time. If a plaintiff can't remember or he
13 does remember but where were they exactly at the time, these
14 command rosters have actually been very helpful for showing us
15 where everybody was at the time. We're talking about a one
16 page document each. We're not trying to go back twenty years.
17 We're only saying back to 1998 which was when the MTA and Long
18 Island Railroad merged which appears to be a date that they
19 can't seem to get documents before anyway. So it's not -- this
20 is not a burdensome request. This would be very helpful --

21 THE COURT: I'm not sure what it's relevant to though.
22 If the plaintiff can't remember who somebody was it's unlikely
23 that that person was responsible for a hostile work
24 environment.

25 MS. WALDRON: It's not just who they were but what

1 their position was. They know who it is but they may not know
2 exactly where they were in the command at that time.

3 THE COURT: If they know who they were what does the
4 position matter?

5 MS. WALDRON: Because that would show -- Your Honor,
6 if it's someone -- what level they're at definitely shows it --
7 it's evidence for us to show how the level is and how -- to
8 infer how much of this can you infer to the MTA, how high level
9 that person is at.

10 Your Honor, the other thing is we're going to be --
11 if I look at the chart when I get it and I say oh, that person
12 was a lieutenant at the time I may then say I want to take that
13 person's deposition. If I find out he was just maybe a sergeant
14 I may not need to. There's a lot of discovery in this case
15 that we're having to choose -- pick and choose who are we
16 deposing, who are we not and these command rosters that go back
17 to '98 may help us to -- not even may. They will help us to
18 narrow the case, narrow the issues or narrow depositions of
19 that sort.

20 THE COURT: I'm not sure how it's going to narrow the
21 depositions.

22 MS. WALDRON: We may not need to take a deposition of
23 someone if they're not of a sufficiently high level when -- to
24 make a claim.

25 THE COURT: Well, I would think that if you had

1 someone involved in egregiously hostile conduct you're going to
2 want to take that person's deposition regardless of their rank.
3 Even if you had a non supervisor making --

4 MS. WALDRON: But then, Your Honor, the next
5 question --

6 THE COURT: -- hostile remarks, aren't you going to
7 want to depose that person?

8 MS. WALDRON: We won't know -- we wouldn't necessarily
9 know who that person's supervisor is and that person may then
10 come back with I don't remember who my -- oh, 1998. A lot of
11 these people don't remember the dates and we've seen that come
12 up in our depositions so far. I don't remember exactly where I
13 was in 2002 but I think this is where I was and this is who --
14 where these command rosters place people exactly where they
15 were at that time.

16 THE COURT: Let me ask defendant. What's the
17 objection?

18 MR. BENSON: The objection, Your Honor, is we produced
19 18,000 pages of documents in this case. They're continually
20 asking for things outside of the statute of limitations period.
21 We have -- we think there's no relevance to the request in
22 general but we provided it for the relevant time period out
23 of -- to avoid issues but there's a point when it's just not
24 appropriate and our position here is that pursuant to the rules
25 of evidence, pursuant to the rules of discovery there is

1 absolutely no relevance to this document whatsoever. If an
2 individual is accused or supposedly engaged in conduct that
3 led to a racially hostile working environment it is
4 unfathomable to me that the person who was making that
5 accusation did not know who they were at the time, what rank
6 they were at the time, who their supervisor was, and if they
7 don't they can notice them for deposition and ask them. It's
8 just putting a burden on us. These are not documents that are
9 easily obtainable. They're not single page documents. They're
10 a pain in the neck to recreate and go back and try to find and
11 there's no relevance to them and we shouldn't have to produce
12 them because again there's just nothing that's going to come
13 from them that plaintiffs can't somehow get from some other
14 source or to the extent that there was relevance which I don't
15 see any.

16 MS. WALDRON: When we have to notice another ten
17 depositions or twenty depositions to then find out who the
18 supervisor was of this alleged harassment with the hostile work
19 environment then we'll see why we need these. Not everyone --
20 people remember who made the comment at the first level but
21 there's issues in this case of how high then it went up above
22 that, that supervisor. There's a chain of command, Your Honor,
23 you know in police departments, and so then there's certain
24 things that these supervisors -- should they have gone to their
25 command officer -- the next command. Who was it at the time.

1 So that's really where we're going, but if Mr. Benson would
2 rather have me take depositions of all the supervisors and
3 their supervisors when we're ready -- we only have three more
4 months to finish discovery in this case.

5 MR. BENSON: Your Honor, I have no problem if for
6 plaintiff's counsel to pick up the phone and ask me who -- if
7 there's somebody who falls into this category to call me up and
8 ask me and I'll give you an answer.

9 MS. WALDRON: Then will I be able to submit that
10 evidence in court some day?

11 THE COURT: This is --

12 [Pause in proceedings.]

13 THE COURT: With respect to the command rosters for
14 the period prior to 2003, I'm going to sustain the objection
15 but at the same time I'm going to grant plaintiff's leave to
16 serve interrogatories seeking relevant information regarding
17 the chain of command. If you have a situation where someone
18 says I don't remember who my supervisor was, you can serve an
19 interrogatory and they're going to have to answer it without
20 regard to Local Rule 33.3 and for the --

21 MR. BENSON: We're okay with that, Your Honor.

22 THE COURT: I'm sorry.

23 MR. BENSON: I said that was what we were suggesting.

24 THE COURT: You'll get it in admissible form then.

25 MS. WALDRON: Yes. That's fine, Your Honor. We did

1 serve interrogatories of this nature and we got objections on
2 it. We didn't pursue it because we thought we would get
3 documents too but we will serve additional ones.

4 THE COURT: All right. Well, this is eliminating the
5 Rule 33.3 objection. If the defendant wants to make a
6 relevance objection, the relevance objection they can still
7 make and if there's a problem we'll resolve it but presumably
8 it won't be -- what I don't contemplate is identify the entire
9 chain of command. What I contemplate are interrogatories
10 asking about specific supervisors because there's been --
11 they've been referenced in other discovery responses or they've
12 been referenced by plaintiff. It's not an invitation to ask
13 for the command roster through interrogatories.

14 MR. BENSON: Your Honor, I'm sorry. There's two
15 issues with respect to the personnel files that were not
16 previously covered.

17 THE COURT: Okay. Go ahead.

18 MR. BENSON: Two additional what they would phrase as
19 disciplinary comparators are raised in a joint letter. One is
20 a group of four or five individuals who were involved in an
21 incident at Penn Station involving an assault of a civilian and
22 none of the -- two uniformed police officers, a sergeant and a
23 lieutenant. None of the plaintiffs were involved in this
24 incident. None of the plaintiffs have alleged that they've
25 been involved in a comparable incident and we objected to this

1 in that it has nothing to do with any discipline that the
2 plaintiffs allege they've been disproportionately assessed
3 with. Essentially, they're trying to show that -- as they
4 said, this is a -- what they claim would be a particularly
5 egregious incident that did -- they claim did not result in
6 discipline. We don't think it has anything to do with anything
7 the plaintiffs are claiming.

8 The second item would be there's an individual named
9 Sergeant Quinn who is involved in a case with another
10 individual who counsel represents in the Division of Human
11 Rights where there was an altercation between the sergeant and
12 the claimant -- complainant in that case. They have identified
13 him as a comparator. None of the plaintiffs in this case had
14 anything to do with that and this is simply seeking that
15 individual's personnel file for purposes of that other case
16 although they may claim that they want to show that he wasn't
17 disciplined for that incident. None of the individuals here
18 are alleging that they were in a physical altercation and were
19 in a comparable incident where comparable discipline could be
20 assessed.

21 THE COURT: Tell me about the assault on the
22 individual in Penn Station first. What happened?

23 MR. BENSON: There was an incident where an individual
24 at Penn Station was assaulted by a police officer. That police
25 officer resigned rather than be terminated.

1 THE COURT: What happened to the individual?

2 MR. BENSON: The individual was a homeless individual
3 at Penn Station who engaged in an altercation with a police
4 officer and complained of physical injuries as a result, an
5 African-American civilian homeless person in Penn Station.

6 These individuals --

7 THE COURT: Did he or she wind up going to the
8 hospital?

9 MR. BENSON: I believe -- that's likely the case, Your
10 Honor.

11 THE COURT: Were any of the officers disciplined?

12 MR. BENSON: Yes.

13 MR. FUCHS: He resigned. He no longer has a job.

14 MR. BENSON: One officer resigns. Another -- a
15 supervisor was terminated and two officers who came forward and
16 cooperated were not. Again, this was a criminal proceeding.
17 It was a separate proceeding. We don't think that has anything
18 to do with the plaintiff's claims and we don't want to open up
19 the door to extensive discovery about this other proceeding.
20 We don't see how it compares to any discipline that the
21 plaintiffs claim have been disproportionately assessed with.

22 THE COURT: The individuals involved in the assault on
23 the homeless person, did they have the same supervisors as any
24 of the plaintiffs --

25 MR. BENSON: Not that I'm aware of, Your Honor.

1 THE COURT: -- at the time?

2 MS. WALDRON: I think there was a possibility that
3 there was, Your Honor. We can check. There's ones that we can
4 easily find out. I didn't bring the [inaudible] because I
5 thought it was covered by [inaudible] but we believe they're
6 comparators, similarly situated people to some of our
7 plaintiffs and this is exactly why we wanted the discipline
8 files and the other misconduct issues. I thought that was
9 covered by your ruling already.

10 THE COURT: Were any charges filed against the
11 individual who was assaulted?

12 MR. BENSON: Against the civilian who was assaulted?

13 THE COURT: Yes.

14 MR. BENSON: I don't believe so, Your Honor.

15 MR. FUCHS: I don't know the answer to that. But
16 disciplinary charges were filed in connection with both the
17 individual accused of the assault and that person's supervisor,
18 both of whom are no longer -- no longer work for us. One who
19 resigned other than face discipline and the other who lost his
20 job as a result of a discipline.

21 THE COURT: There were two other individuals involved
22 who were not --

23 MR. FUCHS: Who are witnesses not involved in the
24 assault who cooperated and provided testimony in the
25 disciplinary proceedings and they were not.

1 MR. BENSON: The reason these are being sought is the
2 two witnesses -- I guess the plaintiffs are under the
3 impression that -- I'm sorry. They seek the files of all
4 involved here. Again, none of the plaintiffs were involved in
5 this incident.

6 MR. FUCHS: Or any similar incidents.

7 MS. WALDRON: Well, we do --

8 THE COURT: What are your thoughts, Ms. Waldron?

9 MS. WALDRON: Well, Your Honor, we have -- we chose
10 these incidents because we felt that they were similarly
11 situated in a sense that at least one of our plaintiffs was
12 involved in an assault and received very different kinds of
13 penalties. There was -- as far as we understood, there was
14 issues about the penalties that were more lenient either it was
15 because they were suspended but they were receiving payroll,
16 they were suspended. There's issues in these cases that we
17 believe do overlap and just because -- the Sergeant Quinn issue
18 because we represent the --

19 THE COURT: Put Sergeant Quinn aside just for a
20 moment.

21 MS. WALDRON: Just the Penn Station issue. We have a
22 plaintiff in our case who was allegedly involved in an assault
23 who was --

24 MR. BENSON: Who?

25 MS. WALDRON: Would you like me to release --

1 THE COURT: Just direct -- I want you directing your
2 comments to me.

3 MR. BENSON: I'm sorry.

4 THE COURT: Go ahead.

5 MS. WALDRON: So, Your Honor, we believe that there
6 was issues in how that was treated and the penalties that were
7 given at the time and whether it was delayed in the penalties
8 and whether they were suspended. This is a question about
9 whether they were suspended with or without pay and how our
10 plaintiff, one of our plaintiffs had been treated with regard
11 to when he was involved with an assault issue. Then -- we --

12 THE COURT: It sounds as if it's ambiguous evidence.
13 If you have two people who were -- who left the MTA and two
14 people who were not disciplined I'm not sure that gives rise to
15 any inference but --

16 MS. WALDRON: If we have -- if one of our plaintiffs
17 was involved in an assault and was disciplined then that's --
18 there would be issues here, Your Honor.

19 THE COURT: Well, was the plaintiff terminated?

20 MS. WALDRON: He was not terminated bu the was
21 suspended without pay for a period of time.

22 THE COURT: So one of the individuals involved in the
23 Penn Station assault was treated worse than your plaintiff. He
24 was terminated.

25 MS. WALDRON: But some were treated better.

1 MR. BENSON: Your Honor --

2 THE COURT: So it's ambiguous.

3 MR. BENSON: If I may be heard. They're speaking
4 about an MTA police officer named Mark Thomas who's not a
5 plaintiff in this case. He was the one who was involved in the
6 Sergeant Quinn case.

7 THE COURT: Who is the plaintiff who was involved in
8 the assault?

9 MS. WALDRON: As far as we know we're not talking
10 about Mark Thomas. We're under the belief based on allegations
11 told to us by our plaintiffs about Mr. Blake Willett who's
12 different.

13 Your Honor, again, we don't -- we have not ever seen
14 these records. This is the first time we're hearing that
15 people were terminated and not just suspended. But I do believe
16 that some were treated better and some were treated worse.
17 There is evidence there and it also --

18 THE COURT: There's evidence there that points in
19 those directions.

20 MS. WALDRON: But let me just -- if I could address
21 that. If you're terminated because you put -- you assault
22 somebody and put them in the hospital then that maybe is
23 appropriate discipline for one time but if our plaintiff only
24 assaulted someone or didn't assault someone who was not found
25 to be assaulted and then was suspended then there is an issue

1 of -- here if it's not --

2 THE COURT: With respect to the assault in Penn
3 Station I'm going to direct that the files be produced but
4 there's an argument for relevance that the plaintiff is making
5 here which -- this is subject to my earlier proviso that the
6 defendants have the option of making the submission to --
7 making a factual submission to show that the punitive
8 comparators are so differently situated that they were not
9 comparators as a matter of law. But unless you elect to go
10 down that route I'm not going to accept the files with respect
11 to the Penn Station assault.

12 Tell me a little bit more about Sergeant Quinn.

13 Sergeant Quinn is one of the comparators, one of the
14 individuals they designate as a comparator?

15 MS. WALDRON: We believe that we did because he was
16 engaged at the time --

17 THE COURT: I'm sorry. Sergeant Quinn is designated
18 as a comparator?

19 MS. WALDRON: We have him under the comparator file.
20 He was involved in an altercation with an African-American
21 officer and made a derogatory comment to that officer. That
22 African-American officer is not a plaintiff in this case but we
23 do believe that this is again evidence that would bear on
24 how -- that the African-American officer is similarly situated
25 to our -- this is evidence of --

1 THE COURT: Wow, wow. Let me make sure I understand
2 the situation correctly. Sergeant Quinn was engaged in an
3 altercation with an African-American officer and made a
4 derogatory comment to that African-American officer?

5 MS. WALDRON: Yes.

6 THE COURT: And he was not disciplined for it?

7 MS. WALDRON: I'm sorry, Your Honor. What was your
8 question? Was he disciplined for that?

9 THE COURT: Was he disciplined for it?

10 MS. WALDRON: No, that's what we believe. He was not
11 disciplined for it.

12 THE COURT: Did the plaintiffs make racially
13 derogatory remarks about anybody?

14 MS. WALDRON: Did plaintiffs?

15 THE COURT: Yes. The infraction you're saying that
16 Quinn committed was the racially derogatory remark.

17 MS. WALDRON: In addition to there was some sort of a
18 physical altercation and then he was not disciplined for that,
19 Your Honor.

20 THE COURT: Have the plaintiffs engaged in similar
21 conduct?

22 MS. WALDRON: That plaintiff -- that African-American
23 officer --

24 THE COURT: No. The plaintiffs that you're
25 representing in this case, were they involved in similar

1 conduct, altercations with other members of the police force or
2 making racially derogatory remarks?

3 MS. WALDRON: Yes, Your Honor.

4 THE COURT: The first or second or both?

5 MS. WALDRON: The second where -- one of our
6 plaintiffs was involved in an altercation with a supervisor
7 where a racially derogatory comment was made by that supervisor
8 to the officer.

9 THE COURT: No. Did the plaintiffs make racially
10 derogatory remarks?

11 MS. WALDRON: Well, they --

12 THE COURT: The question here is --

13 MS. WALDRON: Yes.

14 THE COURT: On the comparator theory it was -- was
15 Quinn -- did Quinn receive -- did Quinn receive more favorable
16 treatment for similar misconduct?

17 MS. WALDRON: Uh-hum.

18 THE COURT: So I'm trying to determine whether or not
19 any of the plaintiffs engaged in misconduct similar to the
20 misconduct Quinn made -- Quinn is attributed to.

21 MS. WALDRON: I don't know of any plaintiffs who made
22 racially derogatory comments because we're all of minority
23 race. So I don't know of --

24 THE COURT: Anyone can do anything in today's world.

25 MS. WALDRON: I understand. Actually, no. You know

1 what, we do have one. Yes, we do. One of our plaintiffs
2 was -- there is an allegation that he made some remarks to
3 another member or minority which we believe were unfounded and
4 part of this --

5 THE COURT: He was disciplined for those --

6 MS. WALDRON: He wasn't disciplined though, Your
7 Honor. He wasn't disciplined.

8 THE COURT: He was treated the same as Quinn?

9 MS. WALDRON: I guess he was treated the same. They
10 don't discipline for making racially derogatory comments.

11 THE COURT: So what does Quinn get you?

12 MS. WALDRON: The file is having to do with how
13 under -- there's a recent Supreme Court decision that came out,
14 Sprint, where it was talking about similarly situated -- other
15 employees not necessarily just similarly situated -- the
16 supervisors don't have to be similarly situated but if there's
17 evidence of an employee who's similarly situated, if he was
18 treated and I think that falls -- this falls under that
19 category about how this other African-American officer was
20 treated. Maybe the way we worded our requests --

21 THE COURT: No, it's not how the other African-
22 American officer was treated. It's how Quinn was treated is
23 the inquiry.

24 MS. WALDRON: But within that altercation, Your Honor.
25 So both Thomas and how Quinn was treated within that

1 altercation. Both sides of that altercation is what I'm
2 talking about.

3 THE COURT: I don't understand your point.

4 MS. WALDRON: That --

5 THE COURT: I thought you wanted Quinn's disciplinary
6 file.

7 MS. WALDRON: We do because we don't --

8 THE COURT: But it sounds like Quinn -- it sounds like
9 Quinn's treatment and the treatment of the plaintiff for making
10 a racially derogatory remark was the same.

11 MS. WALDRON: No, Your Honor. It was a different
12 point that I was trying to make was that how he was treated
13 with an alteration with an African-American officer. That's
14 what we were focusing in on.

15 THE COURT: Were any of the plaintiffs disciplined for
16 engaging in an altercation?

17 MS. WALDRON: With other members of the -- yes.

18 MR. BENSON: May I be heard, Your Honor?

19 THE COURT: Yes. Go ahead.

20 MR. BENSON: Quinn is a sergeant. Officer Mark Thomas
21 who is the subject of another proceeding and not a plaintiff
22 was his subordinate and his direct report. Officer Thomas
23 physically assaulted Sergeant Quinn and was brought up on
24 disciplinary charges for that. Officer Thomas accepted
25 discipline, signed a waiver accepting discipline in connection

1 with the entire incident where he acknowledged wrongdoing, he
2 admitted guilt to the conduct that was charged and he waived
3 his right to challenge it or go to any disciplinary proceeding.
4 There was never any finding of anything other than Officer
5 Thomas' admission that he engaged in the wrongdoing at issue
6 and his signing a waiver.

7 So Quinn, who has never been the subject of -- he
8 didn't do anything wrong. Thomas admitted he was wrong in
9 connection with the incident and --

10 THE COURT: So no charges were ever brought against
11 Quinn?

12 MR. BENSON: No. He didn't do anything wrong.
13 Charges brought against Thomas --

14 THE COURT: So then there are no documents to produce.
15 What documents are there to produce then?

16 MR. BENSON: They're asking for the entire personnel
17 file including any discipline --

18 THE COURT: I never ordered the production of
19 anybody's entire personnel file.

20 MS. WALDRON: Your Honor, it seems that we're talking
21 about the discipline files.

22 THE COURT: There are no documents I've just been
23 told.

24 MR. BENSON: In connection with that absolutely not.
25 He was not brought up on charges.

1 THE COURT: So there's nothing to produce then. Am I
2 misunderstanding something?

3 MR. BENSON: There's nothing to produce.

4 MR. FUCHS: There would be no documents relating to
5 that incident, discipline against Sergeant Quinn for that
6 incident.

7 THE COURT: Then there's nothing to produce.

8 Is there anything else that plaintiffs want to raise?

9 MS. WALDRON: I thought it was all covered.

10 THE COURT: I'm sorry.

11 MS. WALDRON: No, Your Honor.

12 THE COURT: Is there anything else defendants want to
13 raise?

14 MR. BENSON: Nothing, Your Honor.

15 THE COURT: Thank you all.

16 Just one general request as the case goes on. If
17 there's a request for documents for which the defendants
18 object, first make sure there are responsive documents. What
19 oftentimes happens in a lot of cases is there's a fight over --
20 on the basis of the request itself and you never go to your
21 client and find out there's really nothing there anyway. It
22 will save everybody time and trouble I think.

23 Thank you all.

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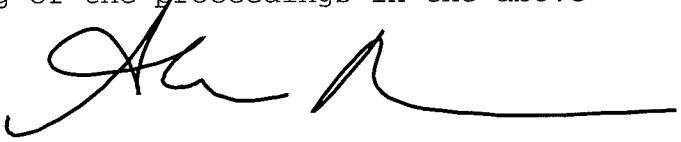
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* * * * *

2 I certify that the foregoing is a court transcript from an
3 electronic sound recording of the proceedings in the above-
4 entitled matter.



5 _____
6 _____
7 Shari Riemer

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Dated: August 8, 2008

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